IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

Two Cases, Nos. 341, 342.

B. I. SALINGER, JR., APPELLANT,

versus

THE UNITED STATES OF AMERICA AND VICTOR LOISEL, AS UNITED STATES MARSHAL, EASTERN DISTRICT OF LOUISIANA, APPELLEES.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA.

PETITION OR MOTION OF B. I. SALINGER, JR., FOR RELIEF, IN AID OF HIS RIGHTS CREATED BY SUPERSEDEAS AND BAIL OBTAINED IN CAUSES NUMBERS 341 AND 342 OF SAID TERM, AND TO STOP INTERFERENCE WITH THE JURISDICTION OF THIS COURT.

B. I. SALINGER,
Attorney for Petitioner.

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To the Honorable

The petition of B. I. Salinger, Jr., of Sioux City, Iowa, respectfully shows:

From the 27th day of April, 1923, there have been pending in the Supreme Court of the United States the above entitled and numbered appeals. Both of them present the

single ultimate question whether petitioner may lawfully be removed from the district of Louisiana to the district of South Dakota because of a certain indictment returned against him in the district of South Dakota and charging misuse of the mails in violation of Section 215, Penal Code.

In each of said appeals there is an order that they shall operate as a *supersedeas,* and in each there is ordered and given "an undertaking in the nature of a *supersedeas* bail bond." Though these appeals are still undecided and said order of *supersedeas* and the said bail bonds still subsist, various persons, among them S. W. Clark, U. S. attorney for the district of South Dakota, and judges and courts hereinafter named, have been and are proceeding against petitioner and restraining and imprisoning him as if there were no such undecided appeals, *supersedeas* orders, or bail bonds, to wit:

An indictment, numbered 983, was returned against petitioner *in the district of South Dakota.* It accuses him and two others of said violation of Section 215, Penal Code, but has no conspiracy count. Though returned in South Dakota its only material fact allegation is that letters were mailed *in the northern district of Iowa,* to wit, letters addressed and delivered to addressees in the *southern* division of the district of South Dakota. Despite that, and in violation of Section 53, Judicial Code, said indictment was returned in the *western* division of said district, and, in violation of said statute, a transfer was made from said western division to said southern division *on the application of the Government,* though if there be power to make transfer at all except *out of* the division of alleged commission, it must, under said Section 53, be *on the application of the defendant.*

Such proceedings were had under said indictment as required petitioner to execute a bond to appear to said indictment in the said southern division during its April term in 1923. Between the execution and delivery of said bond and the first day of said April term, and while petitioner was in New Orleans, the sureties on his said bond surrendered him to a United States commissioner, who thereupon exonerated said bond and committed petitioner to the custody of the marshal. Later, under Section 1014 R. S., demanding the removal of petitioner to the said southern division, was lodged before said commissioner, and on that complaint he committed petitioner to the marshal to be held for removal. Thereupon petitioner sued out and obtained two writs of *habeas corpus* in the District Court of the United States for the Eastern District of Louisiana to test each of said two commitments. The attacks upon each of said commitments are identical (and are more fully set forth in another connection).

Said District Court considered both writs in a single hearing. During this hearing, and on April 20, 1923, the Government made oral request for a warrant of removal and one was then signed. Nothing was then done to execute the order. At the conclusion of said hearing, to wit, on April 26, 1923, said court discharged each of said writs and in each of said *habeas corpus* proceedings remanded petitioner to the custody of the marshal.

On April 27, 1923, said court allowed an appeal to the Supreme Court of the United States as to each of said judgments of remand. Its order in the premises was in words and figures as follows, to wit:

> "It is ordered that an appeal be allowed from the judgment of the court (naming it) to the Supreme Court of the United States, as applied for in said petition, and that said appeal and citation thereon be issued, served, and returned in accordance with law. And it is further ordered that said appeal shall operate as a supersedeas until the final determination of said appeal by the Supreme Court of the United States; that to effect said *supersedeas* said B. I. Salinger, Jr., "shall give approved bond in $100 conditioned that" he shall prosecute the appeal to effect and answer all damages and costs if he fail to make his plea good; and shall further enter into an undertaking *in the nature of a supersedeas bail bond* in the penal sum of $15,000 (sureties to be approved) conditioned for the appearance and surrender of said B. I. Salinger, Jr., before the Supreme Court of the United States, Washington, D. C., and that he shall abide the further order of said court and not depart the same, in the event the order being reviewed in these proceedings shall be affirmed."

On the same day, to wit, on the 27th day of April, 1923, petitioner executed the bonds as above required, including two undertakings "in the nature of a supersedeas bail bond," conditioned as above required, said bonds being $15,000 in one of the said appeals and $5,000 in the other. The conditions of said bail bonds are that the obligor

> "shall be and appear before the said Supreme Court of the United States at and during the present term thereof and from day to day thereafter and shall be and appear before the said court at the next regular or special term thereof on the first day thereof and term to term thereafter until finally discharged therefrom and shall abide the order and judgment of said

United States Supreme Court and not to depart the court without leave, and shall further abide by and obey all orders made by the said Supreme Court of the United States in this cause, and shall surrender himself in execution of the judgment appealed from as said court may direct if the judgment of said United States District Court, Eastern District of Louisiana, New Orleans, in this cause, shall be affirmed by the Supreme Court of the United States."

Citation was issued and served, both in due time and manner.

On said single ultimate question whether accused might lawfully be removed because of the said South Dakota indictment, there are involved the following propositions, among others:

On the authority of Stever's case, 222 U. S., 167, none but the northern district of Iowa has jurisdistion to prosecute.

On the authority of the Post case, 161 U. S., 583; Beaver's case, 194 U. S., at top 85; Paul's case, 148 U. S., 107, 121, and Chenault's case, 230 Fed., 943, an indictment returned in one division that charges offending in another is a nullity which cannot base a removal, and that this is true for the further reason that Section 53 of the Judicial Code commands that all "prosecutions" must be had in the division of commission.

There is no jurisdiction to remove to the southern division of South Dakota because not only was there no jurisdiction to return the indictment in the western division, but no power or jurisdiction to transfer for prosecution to said southern division—this, because the transfer was made on the application of the

Government, though said Section 53 permits transfer only on the application of the defendant.

In so far as two certain decisions by the Circuit Court of Appeals of the Eighth Circuit may run counter to the decisions of the Supreme Court above referred to, said circuit decisions should not be followed because they are opposed to the said Supreme Court decisions which they do not so much as mention; that one of said circuit decisions has the further vice of being a bald *dictum*, that the other is utterly violative of reason, and that neither asserts or has the slightest support in authority.

It is the undisputed testimony that neither defendant named in said indictment was in the District of South Dakota at any material time mentioned in said indictment.

On April 26, 1923, the court discharged the two writs involved in the appeals to this court and ordered remand. On the same day the judge of the court ordered the said removal warrant signed on April 20th to be executed.

On the 27th day of April, petitioner perfected the said two appeals but, despite that fact, the removal was about to be proceeded with.

To resist this, petitioner, on April 17, 1923, sued out a third writ of habeas corpus in said District Court to prevent such removal. Such third writ issued on April 27th, and the proceeding thereon was set for hearing and was heard on April 28, 1923, a day after said two appeals to this court had been perfected. On the same day the court dismissed said third petition and writ and again ordered the removal, despite the said appeals. But, finally, the court gave a short time wherein to obtain relief, if any might be had, from the Circuit Court of Appeals of the Fifth Circuit. There-

upon, the senior judge of said Circuit Court of Appeals was applied to to grant and did allow an appeal in the premises. He exacted a bail bond to abide the orders of said Circuit Court of Appeals, which bond is more fully described in another connection.

While said three appeals were pending, petitioner was in Chicago, Illinois, with permission of the said Distirct Court of Louisiana. While in Chicago, one Fred R. Briggs, a representative of the Department of Justice, lodged complaint against him under Section 1014 R. S., and before a United States Commissioner. The complaint said nothing about the pendency of either of said appeals or of supersedeas or bail. In all the proceedings heretofore narrated, petitioner was constantly put to the burden and expense of obtaining appearance bonds as well as the said three bail bonds. Before the Chicago Commissioner an appearance bond of $25,000 was exacted.

On hearing, Commissioner being made aware of said appeals, supersedeas and bail bonds, discharged petitioner. Thereupon one James A. O'Callaghan, the attorney who represented the Government before the Commissioner, at once filed another complaint under section 1014, without mention of any of said appeals, supersedeas orders or bail bonds therein.

This information was laid before Hon. J. R. Wilkerson, judge of the United States District Court for the eastern district of Illinois.

In the beginning the judge declared:

> I must say it appears to me on the papers before me the Commissioner did not err. I have intimated, I think, that this Court is without jurisdiction in

view of the pendency of the identical question in the Circuit Court of Appeals for the fifth circuit, which is undecided. That is my view now. I have told counsel I would hear arguments on it. Under these circumstances I would hesitate to require defendant to give any further bond.

There is another suit pending, involving the question you are raising here. The question at issue is the right of the United States to take this defendant to South Dakota for trial, isn't it?

O'CALLAGHAN: That is the question.

COURT: That question is pending in another court, isn't it?

O'CALLAGHAN: Yes. As I understand it, it is pending now in the Circuit Court of Appeals of the 5th Circuit.

COURT: Suppose you get an appeal to our Circuit Court of Appeals and Judge Baker gives you a supersedeas and I grant permission for you to leave the district and you go home. While pending in our C. C. A. has the marshal a right to seize you in Omaha and subject you to removal proceedings again?

O'CALLAGHAN: Yes.

COURT: In other words, the question is: may they seize you in every district notwithstanding you have pending a case in which the question of a right to be removed at all is pending?

O'CALLAGHAN: I will answer that by saying if he has a right to go into all the courts, the United States surely has the right to go into all districts.

COURT: It would be really intolerable if removal proceedings could be brought in every district.

At this point Judge Wilkerson was advised of the pendency of the two Supreme Court appeals and the super-

sedeas therein; and was told by counsel for petitioner that if said judge could now take from the Supreme Court of the United States the decision of a pending case involving the very question pending in the instant removal case, then no reason existed why during the very hearing in Chicago another judge might not proceed with new removal proceedings. Thereupon, the judge discussed as to what might happen if it were assumed there was some irregularity in the Supreme Court proceedings and in that connection said:

> However, of course if the Supreme Court decides he should not be removed that ends the matter. That is binding on every court.
>
> Why should not this proceeding be permitted to stand until a reasonable opportunity to get a decision from the Supreme Court? In such a case as this, there is no doubt in the world that on that matter being brought before the Supreme Court they would expedite the case and decide it in two weeks. If there is a supersedeas to the Supreme Court, you can certainly get to the Supreme Court. But I am not going to dismiss this proceeding here from this jurisdiction. The question is whether I will hold it up until the Supreme Court has decided this case, and I will say frankly I am very much inclined that way.

At this point, about October 5, 1923, the judge changed his original position that he would not feel justified in requiring further bond and exacted and obtained an appearance bond in the sum of $10,000. Assurance was given the Court at this time that if an adjournment were granted the attorneys for the Government would attempt to dismiss said two appeals in this court, and opinion was expressed that they would be able to do so. Adjournment was granted to

October 29th, to enable them to sustain that opinion. When that time arrived nothing had been done toward dismissing said appeals. The judge thereupon gave until November 28, 1923, to get rid of the Supreme Court appeals, if that might be done. On the last named date nothing had still been done as to the obtaining of a dismissal. This time the judge adjourned the matter to December 10, but directed the attorneys representing the Government to telegraph the attorney general to ascertain what his intentions were as to seeking dismissal.

At this writing, December 8, 1923, nothing has still been done towards obtaining a dismissal of said appeals—and a motion to dismiss could have been made any time since May 24, 1923, when the record was lodged in this court.

While these proceedings were being had in Chicago, some representative of the Department of Justice attempted to apprehend petitioner in New York City, believing petitioner to be there.

The submission of the appeal in the said Circuit Court of Appeals was set for December 3, 1923. Petitioner was under bond to appear in that court at that time and, as seen, was also held to appear before Judge Wilkerson.

The bond exacted by the Circuit Court of Appeals was conditioned that this petitioner

> Should appear on the first day of its next term held in New Orleans and from then on until finally discharged; that he should abide by and obey all orders made by said Court in said appeal; that he should surrender himself in execution of judgment and sentence appealed from as said court may direct "if the judgment and sentence of the said District Court against him shall be affirmed" by said Circuit Court of Appeals.

He applied to Judge Wilkerson for permission to meet his obligation to appear in the Circuit Court of Appeals, and the application was denied. The reason assigned was that the judge had no authority to act beyond his district and that it was an absurdity to claim that the physical presence of petitioner was required at the hearing in the Circuit Court of Appeals. He added that all he was concerned with was that petitioner be in Chicago when December 10th arrived.

Petitioner appeared in said Circuit Court of Appeals at New Orleans on December 3rd, and was personally present in said Court during the argument and submission of his appeal therein.

Petitioner in nowise breached the conditions of his said bond. On said 3rd day of December the said Circuit Court of Appeals was advised on the oral argument of the pendency of said two appeals and the existence and effect of appeals with supersedeas, and that these things did exist, and their effect is elaborately presented in the record and brief in said appeal in said court; and counsel for the Government went so far as to say that any interference with the said two appeals was something for the Supreme Court to take care of.

Notwithstanding, said Court without notice, evidence or hearing, and while petitioner was in Court as aforesaid, made the following order:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Order Committing Appellant to Custody Pending Determination of Case.

Extract from the Minutes of December 3rd, 1923.

No. 4088.

B. I. SALINGER, JR.,

versus

THE UNITED STATES OF AMERICA and VICTOR LOISEL, *as U. S. Marshal, Eastern District of La.*

It is ordered that a commitment issue herein committing B. I. Salinger, Jr., appellant herein, to the Parish Prison of the Parish of Orleans, State of Louisiana, at New Orleans, La., pending the determination of the above entitled and numbered cause.

And petitioner is now in prison under said commitment and oral command of said court that the marshal take him at once into custody.

Your petitioner is unjustly and unlawfully detained and restrained of his liberty by, and is now in the custody of, Victor Loisel as United States marshal of the Eastern District of Louisiana.

Said detention and restraint is not by virtue of any final judgment of any court of competent jurisdiction, either Federal or State; and as to the said imprisonment and detention, no other application than this has ever been made.

That to the best of the knowledge, information, and belief of your petitioner, the pretense for his said detention is that said marshal claims the right to hold and imprison him by virtue of said order of commitment of date December 3, 1923.

The said Circuit Court of Appeals was without jurisdiction to make any order whatsoever in the alleged appeal pending in it; and if it be assumed it did have jurisdiction of said appeal, the said order of commitment is an act beyond the jurisdiction of said court and is violative of law and of the rights given petition by the Constitution of the United States. This, first, because said commitment was ordered without notice, evidence or hearing; it was in violation of bail bond exacted by said court and which petitioner in nowise breached; third, because when said alleged appeal was perfected in said Circuit Court of Appeals, the Supreme Court of the United States had already taken full jurisdiction of the matters presented by said appeal and was still retaining, and to this day retains, such full jurisdiction—and said commitment is also in violation of the supersedeas granted in two appeals now pending in the Supreme Court, and which appeals are the ones by which the Supreme Court had obtained said full jurisdiction at the time the said alleged appeal to said Circuit Court of Appeals was perfected.

Rule 33 of the said Circuit Court of Appeals provides that pending an appeal from the final decision of any court or judge discharging the writ of *habeas corpus* after it has been issued the prisoner shall be remanded to the custody from which he was taken by the writ or shall for good reason shown be detained in the custody of the court or judge, or be enlarged upon recognizance.

The rule further provides that where the appeal is pending from a declination to grant the writ the custody of the prisoner shall not be disturbed. As seen, this petitioner had been enlarged upon recognizance under order of the senior judge of said Circuit Court of Appeals; therefore the said commitment treated petitioner precisely as if he had not given bail as directed or had in some manner breached it, or as if, instead of having obtained the writ and having had a hearing thereon, the application for the writ had been denied.

On the closing argument for petitioner, it was declared from the bench that even if it should be held that a former application in another circuit and its denial there did not work an adjudication against petitioner, a repetition of the application might constitute a misuse of the writ.

On response that the court to whom the second application was made was not bound to grant the writ and that on refusal of the writ custody would remain undisturbed, which would end any chance to misuse the writ, it was responded from the bench, speaking of the commitment aforesaid, that it was sure petitioner would not make any further repetition of an attempt to obtain a writ of *habeas corpus*.

Said remarks from the bench indicate that if there be an affirmance petitioner would not be enlarged on bail, but would have to submit to immediate removal on the order of the District Court, and that he was being summarily imprisoned so there might be no possibility of further offense consisting of availing himself of the right given him by law to appeal to other courts as long as the order against him was one that he be remanded.

In no return that was made in the said three *habeas cor-*

pus proceedings was there any affirmative plea, and no pleas in the nature of any estoppel or avoidance, and said return consisted of nothing but admissions and denials of the allegations of the petitions in *habeas corpus*.

In further support hereof reference is made to the record in said two appeals and to the affidavit hereto attached.

By reason of the foregoing, petitioner respectfully urges that he is unlawfully detained and restrained of his liberty and about to be deprived of the benefit of his appeals herein, and prays that writs of *habeas corpus, certiorari,* injunction or other lawful writ be granted to the end that the interference with the jurisdiction of the court herein complained of and any others may be prevented and for such other writ or relief as may be proper or necessary in the premises.

B. I. SALINGER, JR.,

By —— ——,

His Attorney.

DISTRICT OF COLUMBIA, *ss:*

Personally came and appeared before me B. I. Salinger, who being duly sworn upon his oath deposes and says that he is counsel for B. I. Salinger, Jr., the petitioner named in the within petition; that said petitioner is now in prison in the custody of the United States marshal for the Eastern District of Louisiana; that affiant is making this affidavit under authority given him by said petitioner and because, owing to his imprisonment, the petitioner is unable to do so himself; that affiant has read the foregoing petition and knows the contents thereof, that with exception later stated, he has personal knowledge of the fact allegations therein contained, either by personal examination of court records involved or by being personally present when matters set

forth in the petition occurred; that as to the allegations as to what occurred in Chicago and in New York City, and the conduct of Clark, affiant has been credibly informed, and so he verily believes that the occurrences alleged to have taken place are as stated in this petition; he deposes further that no previous application for the writ of *habeas corpus* on account of detention and imprisonment complained of in the foregoing petition has been made—and he says all the matters alleged in the petition are true to the best of his knowledge, information and belief.

——— ———.

Subscribed and sworn to before me this 8th day of December, 1923.

——— ———,
Notary Public, D. C.

My commission expires June 13, 1927.

Certificate of Counsel.

The undersigned, attorney for appellant and petitioner, certifies that he is a member of the bar of this court; that this application is made in good faith; that said appeals were taken in good faith and not for purposes of delay; that the third *habeas corpus* proceeding order was made on April 28, 1923; that the record herein was lodged by petitioner on May 24, 1923; that petitioner has made every effort to have the said lodged record printed promptly.

And the undersigned is authorized by the petitioner to say petitioner is willing to have the hearing of said appeals advanced, and stands ready to make argument promptly as soon as he can obtain a printed copy of the record.

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I.

Petitioner has two appeals pending here. They test whether anyone, anywhere, by any means whatever, may lawfully have him removed because a certain indictment exists. That these appeals are not frivolous is demonstrated

by what the application here shows the major basis of appeals to be. One glance at that showing and any examination of Stever's Case, 222 U. S., 167; Post's Case, 161 U. S., 583; Beaver's Case, 194 U. S., at top page 85; Paul's Case, 148 U. S., 107, 121; Tinsley, 205 U. S., —; and of Section 53 Judicial Code will convince that, at the least, these appeals raise serious and substantial federal questions.

Be that as it may, no attempt has been made to dismiss; and under *Shipp's* and many others this Court alone may say whether or not the appeals are substantial—and no one other than this Court can pass even on whether it has jurisdiction to entertain these appeals. So long as they remain here no one may interfere with their effectiveness by deciding for himself that they do not deserve to be treated as appeals in which there might be an effective decision. That is a truism. If this be not so, the jurisdiction of this Court exists only on sufferance.

What interference is there? The appeals order that they operate as a supersedeas. Supersedeas bail bonds have been given. This works a command that petitioner shall not be put in custody, and of course shall not be removed until said appeals are decided here. Individuals, judges and courts are now promoting and entertaining proceedings to remove petitioner under the very indictment which is involved in said appeals; they are compelling petitioner to give appearance bonds in such proceedings, and one court has actually imprisoned him. All this, though each of these knew that this was being done while this court has for decision whether petitioner shall ever be removed under said indictment, and while they knew also that there exists an order of this court which enlarges petitioner pending final decision

of said appeals. If that is permissible, the Shipp case, 203 U. S., 563, and the Jones case, 226 U. S., 148, that follows the Shipp case, no longer rule. If they are still regnant, they settle that no such interference is permissible.

True, the Shipp case deals with murdering appellant, pending his appeal. But that is adventitious. This court did not punish the murderer, but did punish because the murdering made ineffective the pending appeal of the victim. There would have been punishment if something other than lynching had made said appeal ineffective in whole or in part.

It cannot matter what agent or what acts on his part interfere with the appellate jurisdiction; the sole question is whether there is interference. Wehrman, 177 Iowa, at 549, 550; Goodard, 94 U. S., 672; Noyes, 121 Fed., C. C. A., 209.

That must be so. Interference is interference. The method is not the same in any two cases. The agent, as well as the act differ. There can be no hard and fast rule as to the relief the appellate court may give. It may be an order to refrain from acting or to abandon action already had, or both. The right and power to stop the interference, if substantial, must be so elastic as to reach whoever interferes and to reach whatever method is used to interfere. Wehrman, 177 Iowa, 549, 550.

Neither the agent nor the act are material. If a court or judge had ordered or in some way facilitated the lynching in Shipp's case they would have been dealt with as Shipp was. If some court or judge now enjoined petitioner, say, from expending any money to prepare his argument in these appeals, surely this court would not be powerless to

obtain adequate presentation by the appellant because the enjoining was the act of a court or judge.

II.

Just a glance as to the consequences should this court decline to interfere. Though petitioner is ordered enlarged by reason of the *supersedeas* in his two appeals and because he has given said *supersedeas* bail bonds, Judge Wilkerson is entertaining removal proceedings and has exacted an appearance bond. The Circuit Court of Appeals of the Fifth Circuit has imprisoned petitioner during the pendency of his appeal in that court. To say nothing of the fact that said Court of Appeals has no jurisdiction because it is acting, and always has acted, on the very matter that this court has taken jurisdiction of, it is manifest what may happen. If that Court of Appeals shall affirm, petitioner will at once be removed under said indictment under the order of the District Court of Louisiana. Or the imprisonment pending decision may be for a long time, depending upon the time when the Circuit Court of Appeals will enter a decision—and rather than suffer indefinite imprisonment petitioner may be driven to consent to immediate removal. So it may well happen that before the decision of the appeals pending here can be had, and which will decide whether he is to be removed at all, he has already been removed, or, for that matter, tried and been either acquitted or convicted.

Removal pending the decision of these appeals here is therefore manifestly an irreparable injury.

Suppose the decision here should be that there ought to be no removal. It may come at a time when petitioner has already borne the burden and expense of a trial under this

indictment, and when he may be confronted with the further burden of an appeal to this court from a conviction—an appeal that would raise the very questions now pending in this court.

More—the great question in the pending appeals is whether the South Dakota court has jurisdiction. Should it be decided here that such jurisdiction is lacking, then if before that, there is a trial in South Dakota, petitioner will bear the burden of a proceeding in which neither conviction or acquittal would be a bar to a new indictment for the same offense. If there is no jurisdiction to try, no adjudication can be worked by the outcome of the trial.

Only the most outstanding points have been discussed. It is not amiss to add something more on the burdens petitioner is being made to suffer, and, if there is no relief here, must continue to suffer. What has been done to him now may be repeated again and again—and no one could endure this without being broken down physically and financially. Take just one illustration: The record makes plain that had he not appeared at New Orleans he would have been proceeded against by the Circuit Court of Appeals, including the forfeiture of his bond. He did go there, and no one can say, in view of what has already been done by him, what Judge Wilkerson may do, including bond forfeiture, when petitioner fails to be in Chicago on December 10th.

III.

Authorities for the following propositions:

On the power of this Court to intervene and how it may intervene:

Ex parte Milwaukee, 5 Wall. at 190; Hudson, 156 U. S., 277.
Merimac, 219 U. S., 52; Goddard, 94 U. S., 672.
Mayer, 235 U. S., —; Noyes, C. C. C., 121 Fed., 209.
Wehrman, 177 Iowa, at 542, 549, 550.

On mailing being still the gist of the offense under Section 215 as amended:

Badders, 240 U. S., 393, 394; Olsen, C. C. A., 287 Fed., —.

That in the Federal courts a remand in *habeas corpus* is no adjudication.

Ex parte Kain, 3 Latch., page 3; Carter, 105 Fed., 614, 616; Graves, 270 Fed., —.

For the statement of the balance of convenience rule see pronouncement of Taft, J., in the Addyston Pipe and Tile Case. The application of that rule here is that no harm can come to the Government if it is made to keep hands off until this court decides the appeals, and irreparable injury will come to petitioner if the practices heretofore indulged in are permitted to be continued or repeated.

Respectfully submitted,

B. I. SALINGER,
Attorney for Petitioner.